

LAND CONTRACT RECORDING ACT

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The adoption of the so-called Land Contract Recording Act¹ has finally laid to rest an old bugaboo of Ohio real estate practice. Prior to its adoption, one of the five sets of records required to be kept by county recorders under the provisions of Ohio Revised Code section 317.08 was the following:

B. A record of mortgages, in which shall be recorded all mortgages or other instruments of writing by which lands, tenements or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected or encumbered.

There existed no specific provision for the recording of executory contracts for the sale of real estate. Because of this, there was an unwillingness on the part of attorneys to advise clients that the recording of a land contract would constitute constructive notice to third persons of the purchaser's rights, and there was no satisfactory way in which the rights of contract purchasers out of possession could be protected.

The problem was further complicated by the different practices adopted by county recorders from county to county. In some counties, any land contract was accepted for record regardless of form; other county recorders flatly refused to record any land contract; in still other counties those executed with the formality of a deed were accepted for record;² and in one situation known to the writer only those approved by the county prosecutor were entitled to record. With the adoption of the Land Contract Recording Act, the confusion and lack of uniformity between counties are now removed.

The Act amends three sections of the Ohio Revised Code and enacts a new section.

Ohio Revised Code section 317.08 is amended by including, along with the records of mortgages³ required to be kept by the County Recorder, the following:

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¹ Amended House Bill No. 31, effective August 11, 1961.

² See 1955 Ops. Atty. Gen. Ohio No. 5064 to the effect that an executory contract for the sale of land is not entitled to record. *But see* "Recording of Land Contracts" by John C. Grimm of the Akron Bar, 33 Ohio Op. 122, in which the author takes the position that an executory contract for the sale of land, even though not executed with the formalities of a deed, was not only entitled to record but gave constructive notice to third persons.

³ Subsequent to the adoption of Amended House Bill No. 31, House Bill No. 81, the Marketable Title Act, was adopted, effective September 29, 1961. The latter bill, in amending Revised Code section 317.08 to provide for the filing of certain notices,

B(2). All executory installment contracts for the sale of land hereafter executed which by the terms thereof are not required to be fully performed by one or more of the parties thereto within one year of the date of such contracts; . . .

It should be noted that the statute is prospective and will not affect land contracts executed prior to August 11, 1961. In addition, no contract which is to be performed by both parties in less than a year is within the scope of the Act.

Ohio Revised Code section 5301.01, which provides for the manner of execution of deeds, mortgages, and leases is amended by including under its requirements "land contracts as referred to in division (B) (2) of Section 317.08." Accordingly, after August 11, 1961, such land contracts must be signed by the vendor and such signing must be acknowledged by the vendor in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation, and such signing must be acknowledged by the vendor before a notary public or other proper officer who must certify the acknowledgment and subscribe his name to the certificate of such acknowledgment.

Ohio Revised Code section 5301.25, previously provided that all deeds and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements or hereditaments (other than those provided in Ohio Revised Code section 5301.23)⁴ shall be recorded in the office of the county recorder in which the premises are situated, and, until so recorded or filed for record, are fraudulent so far as relates to a subsequent bona fide purchaser having at the time of the purchase no knowledge of the existence of such former deed or instrument. This section has now been amended by including within its purview land contracts referred to in division (B) (2) of Revised Code section 317.08.

A new section (Ohio Revised Code section 5301.331) has been adopted providing for the cancellation, partial release, and assignment of land contracts by separate instruments executed as a deed to be recorded with the mortgage records or by notation on the original land contract or on the margin of the record. The provisions of the new section closely parallel the provisions of Ohio Revised Code section 5301.33 relating to the cancellation, partial release, and assignment of leases.

There are several problems raised by the Act which will require the consideration of counsel.

changed the introductory sentence in Subsection B from "(B) A record of mortgages in which shall be recorded:" to "(B) A record of . . ."

⁴ Ohio Rev. Code § 5301.23 provides for the time from which mortgages take effect, *i.e.*, when presented to the county recorder.

For the first time in Ohio there are statutory requirements for the manner of execution of land contracts. Until the adoption of the Act, the only such requirement was that land contracts be in writing and signed by the parties in order to satisfy the Statute of Frauds.⁵ Now, however, by reason of the amendment of Revised Code section 5301.01, land contracts which are not to be performed within one year must be executed by the vendor with the formalities required for execution of a deed. Furthermore, any such contract not so executed is not entitled to record, and, if recorded, would undoubtedly not constitute constructive notice.⁶ It is to be noted, of course, that the formality of execution applies only to the vendor and not to the purchaser whose signature alone is sufficient compliance with the Statute of Frauds. It is submitted that a land contract signed by the parties, but defectively witnessed or acknowledged, would constitute the basis for specific performance or for reformation.⁷

The right of recordation of land contracts will, however, pose one rather serious problem for vendors. In the past—particularly as to cheaper residential properties—the exercise of termination rights by vendors against defaulting purchasers usually was done informally. The purchasers in such instances often considered the monthly installment payments as tantamount to rent and if they failed to pay the “rent” they expected to be dispossessed. If they voluntarily moved, their continuing obligation under the land contract was of no substantial concern to them, and, in any event, such purchasers were generally unaware of the protection which the law would afford them against an unreasonable forfeiture. In most of these situations, there was no written cancellation of the contract, the purchaser was dispossessed, the property became vacant, there was no record of the purchaser’s interest, and the vendor proceeded to sell the property again. Now, however, if the purchaser records the land contract, the vendor is faced with the expense of quieting his title against the record rights of the defaulting purchaser who has abandoned the property and disappeared or who refuses to cancel the contract of record. A possible solution to this problem would be to include a

⁵ Ohio Rev. Code § 1335.05.

⁶ *Citizens National Bank v. Denison*, 165 Ohio St. 89, 59 Ohio Op. 96, 133 N.E.2d 329 (1956), holding that a defectively executed mortgage did not constitute constructive notice; *Lessee of Shultz v. Moore*, 1 Ohio Fed. Dec. 688, 1 McLean 528 (1839), to the same effect as to deeds; *Langmede v. Weaver*, 65 Ohio St. 17, 60 N.E. 992 (1901), to the same effect as to leases.

⁷ *Wessel v. Shank, Admr.*, 57 Ohio App. 35, 10 Ohio Op. 25, 11 N.E.2d 275 (1937), holding that a defectively executed deed may be construed to be a contract to convey the land described therein so as to constitute the basis for an action for specific performance; *Spitzer v. Vanselow*, 22 Ohio L. Abs. 377 (1936); 17 Ohio Jur. 2d. “Deeds” §§ 32, 133; 37 Ohio Jur. 2d “Mortgages” §§ 92, 277.

provision in the contract designating the vendor as agent of the purchaser to execute a cancellation of the contract in the event of default if the purchaser fails to do so.

A statutory provision which will now apply to land contracts executed in Ohio is Revised Code section 317.11.1 requiring a statement at the end of the contract disclosing the name of the person who prepared it. Because of the rule of construction to the effect that an instrument will be construed against the party who prepared the instrument,⁸ it is suggested that the name of counsel for each party to the contract appear in the required statement.

Another problem which may confront counsel is the effect of recording a memorandum of a land contract. Is such memorandum entitled to record, and, if recorded, will such memorandum constitute constructive notice? A similar problem has long existed in Ohio with respect to leases and is still unresolved.

Attention is also called to the fact that Ohio Revised Code section 5301.331 provides that a cancellation, partial release or assignment may be written on the *original* land contract. (emphasis added) Under a strict construction of this section, county recorders might refuse to make a marginal notation of a cancellation, partial release or assignment written on an executed copy of the contract. Ohio Revised Code section 5301.33, containing similar language with respect to leases, has never been so construed to the writer's knowledge by county recorders, and it is presumed that they will not so construe the new section. It might, however, be advisable in drafting land contracts for counsel to provide that each fully executed counterpart shall be deemed to be an original.

Because of the Land Contract Recording Act, prospective purchasers and other interested parties may now safely deal with Ohio lands, protected against the claims of purchasers under unrecorded executory land contracts of which such parties had no actual notice. Similarly, the contract purchaser who is out of possession may now readily protect himself against an unscrupulous vendor, and the recordation of the land contract will irrefutably establish for the purchaser a priority date as to persons subsequently claiming a lien against or interest in the vendor's title.⁹

⁸ 4 Williston on Contracts § 621 (1957).

⁹ There will, however, be brought into sharper focus the necessity of the junior lienor advising the contract purchaser of his lien and the question of the extent of such lien, and whether, after the receipt of such notice, the purchaser may safely make further payments either to the vendor or to the lienor. Possibly the only safe course of conduct for a purchaser in such a dilemma would be to bring an action in declaratory judgment interpleading both the vendor and the lienor. For an interesting discussion of this and related problems, see 3 American Law of Property § 11.29 (1952 ed.).